In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1673

CHARLES EDWARD WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of having possessed a rifle which had not been registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. (Supp. V) 5861(d) and 5871, as amended in 1968. On August 20, 1970, petitioner was sentenced to a two-year term of imprisonment, suspended except as to six months, and was placed on probation

for a period of three years. The court of appeals affirmed without oral argument (Pet. 13-14).

At approximately 11:30 p.m. on October 8, 1969, David Roe, the Chief Deputy Sheriff of Carter County, Tennessee, received a call that petitioner and some women were fighting at a place on "Old Stoney Creek Road." As Sheriff Roe and three other officers arrived on the scene, petitioner came out of a house carrying a sawed-off or short barrel rifle. When his wife shouted something to petitioner from the door of another house, petitioner threatened to shoot her if she did not go inside. As Sheriff Roe started to get out of his car, petitioner ordered him to leave his property, although the officer was not then on his property. Petitioner advanced and put the rifle on the hood of the police automobile. After a further altercation between petitioner and another woman at the scene, the officers arrested petitioner on a charge of disorderly conduct; at this time, they confiscated the rifle, which was found to be loaded (Tr. 10-13, 17-18, 20, 23-27).

Subsequently, Special Investigator James R. Beeler of the Alcohol, Tobacco, and Firearms Division of the Treasury Department was notified about the rifle, and the present charges under the Gun Control Act of 1968 resulted. At trial, Special Investigator Beeler testified that, after being advised of his rights, petitioner told him that the rifle in question had been acquired by him approximately two years previously in trade for a used car (Tr. 33-36).

An affidavit, certified by James B. Cain, Firearms Enforcement Officer in charge of the National Fire-

arms Registration and Transfer Record, was admitted without objection into evidence. The affidavit stated that a diligent search of the records of which Cain had custody and control had revealed no evidence that a firearm of the description alleged was registered to petitioner or that petitioner acquired the weapon by lawful making, transfer, or importation (Tr. 41-43).

1. Petitioner asserts that his prosecution was barred because the federal firearms statute, as amended in 1968, violates his privilege against self-incrimination. The contention is fully answered by the decision of this Court in *United States* v. *Freed*, No. 345, decided on April 5, 1971.

2. Petitioner attacks the sufficiency of the indictment on the ground that it was impermissibly vague. It is clear from a reading of the indictment,[1] however, that it charged the essential elements of the offense and adequately apprised petitioner of the charge against him; he was able to prepare his defense and conviction would bar further prosecutions for the same offense. See *Russell* v. *United States*, 369 U.S. 749; *United States* v. *Debrow*, 346 U.S. 374, 378.

---

[1] The indictment reads:

> The Grand Jury charges that on or about the 8th day of October, 1969, in the Eastern District of Tennessee, Northeastern Division, Charles Edward Webb wilfully and knowingly possessed a firearm, that is, a .22 caliber Remington rifle, having a barrel length of 11-7/8 inches and an overall length of 20-3/4 inches, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Sections 5861(d) and 5871, Title 26, United States Code.

Moreover, as the trial judge noted in denying petitioner's motion to dismiss, he could have moved for a bill of particulars if he had any doubts as to the specifics of the charge.

Petitioner claims that the trial court erred in failing to dismiss the indictment for absence of an allegation of *scienter*. This too is answered by *United States* v. *Freed, supra*, where the Court held that the statute does not require specific proof of knowledge that the firearm was unregistered (slip op. at 6). See also the concurring opinion of Mr. Justice Brennan in *Freed supra*, slip op. 7. Petitioner was obviously aware that he was in possession of the rifle, and no more was required to show violation of the statute.

3. There is no merit to the claim that the government failed to prove that the venue was proper. Both the Sheriff and the Deputy Sheriff sufficiently described the location as in Carter County, Tennessee, "approximately a mile and a quarter north of Elizabethon on what is known in Carter County as the 'Old Stoney Creek Highway' " (Tr. 10, 23). The trial judge could take judicial notice, and the jury drawn from the area could conclude, that Carter County is part of the Eastern District of Tennessee. See *United States* v. *Graves*, 428 F. 2d 196, 201 (C.A. 5); *United States* v. *Lukenbill*, 421 F. 2d 849, 850 (C.A. 9); *United States* v. *Harris*, 331 F. 2d 600, 601 (C.A. 6).

4. Notwithstanding the lack of objection at trial, petitioner contends that it was constitutional error to have permitted introduction of the certificate regarding the results of the search of the government fire-

arms registry. It is well established, however, that an affidavit by an officer having custody of official records as to the lack of a certain record after diligent search is admissible to show the absence of such record or entry and is not violative of the constitutional right of confrontation. *E.g.*, *United States* v. *Thompson*, 420 F. 2d 536, 544-545 (C.A. 3); *Hollingsworth* v. *United States*, 321 F. 2d 342, 352 (C.A. 10); see also Rules 26 and 27, F. R. Cr. P.; *Salinger* v. *United States*, 272 U.S. 542, 547-548.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 425591 659